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Diplomatic protection

Diplomatic protection

Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.[1] In its resolution 61/35, the General Assembly took note of the draft articles as adopted by the Commission and invited Governments to submit comments concerning the Commission's recommendation that the Assembly elaborate a convention on the basis of the articles.[2] By its resolution 62/67, the Assembly welcomed the conclusion of the work of the International Law Commission on diplomatic protection and its adoption of the draft articles and commentary[3] on the topic. The Assembly commended the articles on diplomatic protection presented by the Commission, the text of which was annexed to the resolution, to the attention of Governments and invited them to submit any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles in writing to the Secretary-General. The Assembly decided to further examine, at its sixty-fifth session in 2010, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second session of the Assembly, the question of a convention on diplomatic protection or any other appropriate action on the basis of the above-mentioned articles.

2. By a note verbale dated 7 July 2008, the Secretary-General invited Governments to submit, no later than 1 June 2010, their written comments concerning the recommendation by the Commission to elaborate a convention on the basis of the

* A/65/150.
[1] See A/61/10, para. 49.
[2] See A/62/118 and Add.1.
[3] See A/61/10, para. 50.

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articles on diplomatic protection. That request was reiterated in a note verbale dated 21 August 2009.

3. As at 20 July 2010, the Secretary-General had received written comments from Austria, the Czech Republic, Estonia, France, Kuwait, Malaysia, Paraguay, Portugal, Saudi Arabia, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Those comments are reproduced below, organized according to comments on any future action regarding the articles on diplomatic protection (section II) and on the articles on diplomatic protection themselves (section III).

II. Comments on any future action regarding the articles on diplomatic protection

Austria

[Original: English]
[21 May 2010]

With regard to the proposal to elaborate a convention on diplomatic protection, Austria is not convinced of the usefulness of starting this project immediately. The text adopted on second reading was elaborated in a very short time and it is necessary for States to have some time for reflection on the result. Austria would therefore prefer to wait and place the item on the agenda again after a few years, in order to assess the possibility for taking the necessary steps towards the elaboration of a convention either by convening an ad hoc committee, a preparatory committee or a codification conference. This would give States the opportunity to consider further the contents of the articles.

Czech Republic

[Original: English]
[26 May 2010]

The Czech Republic's written comments on the topic of diplomatic protection were presented to the Secretary-General in 2007.[4] Since that date, there have been no major developments requiring a change of position.

Estonia

[Original: English]
[7 July 2010]

The articles on diplomatic protection are a valuable point of reference for States in matters relating to the exercise of diplomatic protection. They constitute a comprehensive codification of principles of international law followed by States and are therefore highly useful in their current form without the need for further elaboration into a convention.

[4] See A/62/118.

France

[Original: French]
[20 May 2010]

The articles have not managed to address all the difficulties raised by the issue of diplomatic protection in international law. The importance of the doctrine of diplomatic protection and the approaches taken by the Commission amply suggest that States should consider such a topic during an international conference with the aim of adopting an international convention that would harmonize practice with respect to diplomatic protection.

Malaysia

[Original: English]
[29 June 2010]

Diplomatic protection belongs to the subject of "treatment of aliens" but does not deal with the primary rules, which dictate the treatment of the person and property of aliens, a breach of which gives rise to the responsibility of a State towards the injured person. The articles on diplomatic protection are instead confined only to secondary rules that relate mainly to the conditions that must be met to bring a claim for diplomatic protection. By and large, this means the rules governing the admissibility of claims. As is evident from the commentaries to the articles, there exists a well-established corpus of State practice and *opinio juris* on the subject matter. In this regard, it should be noted that the wealth of judicial[5] and arbitral decisions[6] in the field of diplomatic protection represents quite clearly evidence of custom which is binding on States. The codification of the articles will indeed provide clarity of those rules and serve as a guide for the application of diplomatic protection by States vis-à-vis the espousal of claims by their nationals who have been injured by the internationally wrongful acts of other States. Malaysia notes that the articles also represent a progressive development of international law especially as envisaged in articles 8 (Stateless persons and refugees) and 19 (Recommended practice).

The drafting of the articles on diplomatic protection originally belonged to the study of responsibility of States for internationally wrongful acts. In his seventh report,[7] the Special Rapporteur, Mr. John Dugard, observed that the fate of the draft articles on diplomatic protection was closely bound up with that of the draft articles on the responsibility of States for internationally wrongful acts, of 2001.[8] Malaysia

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[5] See *Mavrommatis Palestine Concessions Case (Jurisdiction) (Greece v. United Kingdom), P.C.I.J. Reports, 1924*, Series A, No. 2; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), P.C.I.J. Reports*, Series A/B, No. 76; *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgement, I.C.J. Reports, 1970*; *Reparations for injuries suffered in the service of the United Nations, I.C.J. Reports, 1949*, Advisory Opinion of 11 July 1949.

[6] See *Harry Roberts (U.S.A.) v. United Mexican States (United States v. Mexico, 1926) R.I.A.A.* IV; *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (United States v. Mexico, 1926) R.I.A.A.* IV.

[7] See A/CN.4/567, para. 6.

[8] See General Assembly resolution 56/83 of 12 December 2001.

concurs in this observation and considers that so long as no decision is taken about the elaboration of a convention on the responsibility of States for internationally wrongful acts, any decision to do so for the articles on diplomatic protection would be premature.

Finally, Malaysia notes that, in the past, support has been expressed with regard to the elaboration of an international convention. Malaysia reiterates its commitment to ensuring its nationals are humanely treated abroad and upholds its entitlement to guard its nationals from injuries suffered from the internationally wrongful acts of other States. Malaysia nonetheless believes that the exercise of diplomatic protection should remain within the sovereign prerogative and integral discretion of a State. Taking into account its own concerns and the divergent views of Member States, Malaysia considers it unnecessary at this stage to elaborate a convention as it would risk undermining the important work that has been undertaken by the International Law Commission, particularly if a significant number of States do not ratify the resulting convention.

Portugal

[Original: English]
[1 June 2010]

The completion by the International Law Commission of 19 draft articles on diplomatic protection in less than 10 years since the topic was first identified as suitable for codification and progressive development proves that the topic was indeed ripe and adequate for that purpose and that it is a useful institution in contemporary international relations. Portugal has already welcomed the recommendation by the Commission for the elaboration of a convention on the basis of the articles.

Portugal is in agreement with the articles in general and with their suitability for an international convention, regardless of the fact that during the debates of the Sixth Committee, where the topic was discussed, Portugal voiced some disagreement with regard to certain aspects, in particular concerning both the scope of the articles and their content.

United Kingdom of Great Britain and Northern Ireland

[Original: English]
[15 June 2010]

The United Kingdom has previously expressed the view, in concurrence with that of the Special Rapporteur, that the fate of the articles on diplomatic protection is closely bound up with that of the draft articles on the responsibility of States for internationally wrongful acts. Article 1 of the articles on diplomatic protection defines diplomatic protection in terms of the invocation of the responsibility of another State, and the provisions of the articles can be seen as giving content to the admissibility requirements of article 44 of the articles on the responsibility of States for internationally wrongful acts in the specific context of diplomatic protection.

Consequently the United Kingdom considers that, in the absence of consensus on the elaboration of a convention on the basis of the responsibility of States for

internationally wrongful acts, it would be premature to commence negotiations on a convention based on the articles on diplomatic protection. In its note of 10 March 2010, providing comments on the articles on responsibility of States for internationally wrongful acts,[9] the United Kingdom confirmed its view that embarking on the process of negotiating a convention on the basis of those articles would be neither necessary nor desirable.

Moreover, the United Kingdom notes that the articles on diplomatic protection adopted on second reading contain elements that would amount to progressive development of customary international law, and not simply its codification. Under the circumstances, the United Kingdom would be concerned that a move at this stage to elaborate a convention might risk opening up a debate on the articles, which may undermine the important consolidating work and commentary that has already been undertaken. It also notes that some of the progressive development of the law continues to raise concerns for the United Kingdom, and conflicts with its current practice. It is particularly concerned that the non-binding article 19, entitled "Recommended practice", risks undermining the absolute discretion of a State to decide whether or not to exercise diplomatic protection, and is thus not suitable for inclusion in a convention.

The United Kingdom considers that the articles on diplomatic protection have a valuable role in the clarification and development of customary international law on diplomatic protection. As it has emphasized with respect to both the articles on diplomatic protection and the articles on the responsibility of States for internationally wrongful acts, the elaboration of articles into a convention should not be seen as the only possible successful conclusion to this body of work. The most appropriate final form of the articles is that which best serves the clarification and development of the law, and at present, and in the absence of a convention on responsibility of States for internationally wrongful acts, the United Kingdom considers that that would be best achieved by allowing the articles to inform and influence State practice without moving to negotiate a convention.

United States of America

[Original: English]
[27 May 2010]

During the sixty-second session of the General Assembly in 2007, the United States, along with other countries, expressed concern that a limited number of articles deviate from well-settled customary international law. Nevertheless, to the extent that the articles reflect the large body of State practice in this area, they represent a major contribution to the law of diplomatic protection, and are thus valuable to States in their present form. It is feared that the process of negotiating a convention risks undermining the substantial contributions of the articles. The United States therefore believes that the General Assembly should take no further action on the articles at this time.

[9] See A/65/96.

III. Comments on the articles on diplomatic protection

Kuwait

[Original: Arabic]
[11 August 2008 and 1 June 2010]

The articles on diplomatic protection comprehensively address the various aspects of such protection. However, they are entirely predicated on the occurrence of an internationally wrongful act. This is not a sufficient basis for invoking or exercising diplomatic protection inasmuch as it is now recognized that, according to the theory of risk, international responsibility arises not only from the wrongful act of a State, but also as a result of injuries caused by the lawful acts of a State.

On the basis of this additional criterion, the State is internationally liable for certain actions that are permissible under international law, as is the case with lawful activities undertaken by States in connection with outer space or the environment. In such cases, the State performing the act is obliged to compensate for the injury caused to other States or to their nationals merely because the injury occurred, regardless of whether the State's action was unlawful. It is thus necessary, in article 1, to delete the word "wrongful" from the description of the act that gives rise to diplomatic protection. Otherwise, the article should stand as is.

The proposal of the Government of Kuwait expands the scope of diplomatic protection to include all acts performed by other States, whether lawful or not, and is something desirable in relation to a State's ability to protect its nationals at the international level.

The formulation of articles 3 and 4 is acceptable and consistent with the principles of international law and other relevant trends.

Malaysia

[Original: English]
[29 June 2010]

Under international law, a State is responsible for an injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured person to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. Malaysia concurs with the position, in international law, that a State has no duty or obligation to exercise diplomatic protection. In the *Barcelona Traction* case, it was held that "the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease".[10] Malaysia nonetheless notes that there is support in domestic legislation for the view that there is some obligation on States to exercise diplomatic protection to protect their nationals

[10] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgments, I.C.J. Reports 1970.*

abroad when they have been subjected to serious violations of their human rights.[11] In that regard, article 19, subparagraph (a) of the draft articles on diplomatic protection, recommends to States that due consideration should be given to the possibility of exercising diplomatic protection on behalf of a national who suffers a significant injury. Malaysia further notes with concern that paragraph 3 of the commentary to the article highlights the decision of the South African Constitutional Court in the case of *Kaunda and Others v. President of the Republic of South Africa and Others*.[12]

Article 8 is a progressive development of the law which departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Malaysia is not a party to any treaty relating to stateless persons and refugees and therefore is not bound to recognize the status of such persons.

Malaysia notes that part two, chapter III, generally represents a codification of customary international law as set forth in the *Barcelona Traction* case. However, the entitlement under article 11, subparagraph (a), allowing the State of nationality of the shareholder to exercise diplomatic protection if "The corporation has ceased to exist according to the law of the State ..." would create a broad spectrum of claims to protection by the State of nationality of the shareholders. The articles should draw a distinction between the rights of the corporation, which are to be protected, and the interests of shareholders, which are not. The International Court of Justice, in *Barcelona Traction*, rightly pointed out that permitting a State of nationality of the shareholders the right to protection would create "an atmosphere of confusion and insecurity in international economic relations".[10]

Malaysia notes that part three of the articles is a codification of the customary international law requirement of the exhaustion of local remedies. Malaysia, however, considers that the adoption of the word "manifestly", in article 15, subparagraph (d), is too broad and ambiguous, and a more comprehensive study should be undertaken in order to provide States with clear guidance with regard to that rule.

[11] For example, article 36 of the Constitution of Poland of 1997 declares that a Polish national abroad has a right to protection by the Republic of Poland. Similar provisions can also be found in the constitutions of Albania, Belarus, Bosnia and Herzegovina, Croatia, Hungary, Lithuania, Latvia and Romania.

[12] 2005 (4) *South African Law Reports*, ILM vol. 44, p. 235 (2005) ("[t]here may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action").

Paraguay

[Original: Spanish]
[28 May 2010]

With regard to the articles on diplomatic protection, Paraguay has no objections from the perspective of international law.

Saudi Arabia

[Original: English]
[21 May 2010]

There is a need to simplify and clarify some of the articles, especially the exceptions regarding the requirement of the exhaustion of local remedies, and to provide examples of "other means of peaceful settlement" referred to in article 1. A new paragraph should be added to article 5, as follows:

> "No State should claim diplomatic protection for a person who gains its citizenship after the injury."

The exception would be for individuals who were stateless when the injury was suffered and were legally residing in the State where citizenship was subsequently granted. Article 8 may grant the refugee (with dual citizenship) more rights than other dual citizens (under article 6). In article 15, subparagraph (a), the phrase "reasonably available local remedies" is not precise. It may be said that the jurors system and plea bargaining a confession, which is used in many States, do not reasonably constitute local remedies.